

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KERMIT LEE LOVE,

Defendant-Appellant.

UNPUBLISHED

December 18, 2003

No. 242791

Ingham Circuit Court

LC No. 01-077531-FC

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(a), carrying a concealed weapon in a motor vehicle, MCL 750.227(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, two to five years' imprisonment for the CCW conviction, and two years for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first contends that the prosecution presented insufficient evidence of premeditation to permit the case to go to the jury on the charge of first-degree murder. We disagree. When presented with a motion for a directed verdict, the trial court reviews the evidence presented by the prosecution to the time the motion is made and considers the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact would find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Appellate review of the trial court's decision on a motion for directed verdict is de novo. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). To convict a defendant of first-degree murder, the prosecution must establish that the defendant intended the killing and that act was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation and deliberation are satisfied where the defendant had sufficient time to take a second look and may be inferred from the circumstances surrounding the killing. *Id.* To determine whether sufficient evidence of premeditation has been presented, this Court considers: "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.*

Following de novo review of the record in the light most favorable to the prosecution, we conclude that there was sufficient evidence of premeditation to support the first-degree murder

conviction. *Riley, supra; Werner, supra.* Defendant and his friends were involved in a confrontation in a bar with the victim and the victim's friends. There was pre-existing animosity between the two groups of men. A friend of the victim punched defendant in the bar. Defendant allegedly threatened to "get" or "kill" the victim's friends after the altercation. A bar manager told defendant to leave the bar, but kept the victim and his friends inside the bar to prevent any other problems. Defendant admitted that he left the bar, but remained in the area in his car to wait for a friend to exit the bar. After the victim and his friends left the bar and drove away, defendant's vehicle came alongside the victim's vehicle with its window rolled down, despite the fact that it was a cold winter evening. Impartial witnesses testified that defendant's vehicle and another vehicle appeared to "box in" the victim's car. The impartial witnesses and friends of the victim testified that, after the shooting, defendant brought his vehicle back to the scene, inferring that it was to ensure that the "job was finished off."

After the shooting, defendant purchased illegal identification under an assumed name and fled to Georgia where he began living with a girlfriend. Defendant revealed to his girlfriend that he was involved in an altercation at a club in Lansing. After leaving the club, he reported pursuing the men involved in the altercation and shot into their car. Defendant also reported destroying his vehicle and never alleged that he acted in self-defense. We therefore conclude that the trial court properly determined that sufficient evidence of premeditation had been presented by the prosecutor to permit the case to be submitted to the jury on the charge of first-degree premeditated murder.

Defendant next alleges that the verdict was against the great weight of the evidence. We disagree. This Court reviews the trial court's decision regarding such a motion for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* To counter the evidence that defendant premeditated an attack upon the occupants of the victim's car following an altercation at the bar, defendant presented only his own self-serving testimony, which the jury rejected. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial because the verdict was not against the great weight of the evidence.

Lastly, defendant contends that the trial court erred by failing to question each member of the jury concerning a radio call-in show broadcast during the trial that allegedly discussed this case. This issue is not preserved for appellate review because defendant failed to request questioning of every member of the jury during the trial. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). This Court reviews unpreserved constitutional issues for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Defendant must show that plain error occurred that affected his substantial rights, that is, that the error prejudiced him by affecting the outcome of the proceedings. *Id.* at 763.

To demonstrate that the jury's verdict was based on the improper consideration of extrinsic evidence, defendant was required to "prove that the jury was exposed to extraneous influences" and to "establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 299 (1997). In this case there is *no* evidence that *any* jurors were exposed to the radio broadcast, and there is *no* evidence concerning what was broadcast. The one juror who was questioned stated that she did not hear the broadcast, and she did not hear any other jurors

discussing it. Furthermore, defendant has failed to present the substance of the broadcast and has therefore failed to satisfy the second requirement for establishing a prima facie case. Without any indication of the nature and substance of the broadcast, it is impossible to determine if there was “a real and substantial possibility” that the broadcast could have had an affect on the unfavorable verdict.

Finally, the trial court instructed the jurors not to read or listen to any news reports concerning the case. The jury is presumed to follow the trial court’s instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). We conclude that defendant has failed to establish that the jury was exposed to improper extrinsic evidence. Therefore, defendant has failed to demonstrate plain, outcome-determinative error.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood